IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 485

GUY WHITEFORD, *Petitioner,*

v.

THE HECHT COMPANY, A CORPORATION, *Respondent.*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Guy Whiteford, by his counsel, respectfully prays for a rehearing of the petition heretofore made by him in the above entitled cause, which petition prayed that a writ of certiorari be issued out of, and under the seal of, this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, to the end that the decision of that court, rendered in the case numbered and entitled on its docket No. 8246, The Hecht Company, a corporation, *Appellant,* v. Guy Whiteford, *Appellee,* be reviewed by this Honorable Court.

In support of the present petition for rehearing your petitioner respectfully shows to this Honorable Court:

I. The question presented for the decision of this Court was as follows:

> "Is the evidence, as shown by the record, of a nature that fairminded men might reasonably draw different conclusions as to the fact whether the petitioner was the procuring cause of the lease agreement between the respondent and the Federal Government, or is it of a nature that no reasonable man could reach a verdict in favor of the petitioner?" (Brief in Support of Petition, p. 15.)

This question was framed in the light of a rule of law heretofore firmly established in this jurisdiction, to wit, that on a motion for a directed verdict, or for judgment *non obstante veredicto,* the evidence must be construed most favorably to the plaintiff; that to this end the plaintiff is entitled to the full effect of every legitimate inference therefrom and, if, upon the evidence so considered, fairminded men might reasonably draw different conclusions, the case should go to the jury (*Gunning* v. *Cooley,* 281 U. S. 90, 74 L. Ed. 720; *Jackson* v. *Capital Transit Co.,* 69 App. D. C. 147, 99 Fed. (2nd) 380).

The denial by this Honorable Court of the petition for writ of certiorari permits, *with regard to the above question,* only two conclusions:

First: Either reasonable and fairminded men can draw *but one conclusion* from the evidence as stated, and such conclusion is utterly opposed to the petitioner's right to recover;

Second: Or the rule of law, upon which the aforestated question was predicated, does no longer obtain in this jurisdiction.

The adoption of the *first* conclusion, counsel for the petitioner respectfully submit, leads to the unavoidable inference that—

(1) the statement of the trial judge, namely: "Suffice it to say that after having had the benefit of three arguments of counsel, written briefs and a personal review of the testimony, *it is my opinion that reasonable men might differ* on whether the plaintiff's efforts were the procuring cause" (R. 183);

(2) the statement of the dissenting justice in the Court of Appeals, with reference to the evidence, to wit: "What boots it, if, as held in *Gunning* v. *Cooley, supra,* fairminded men might honestly draw different conclusions?" (R. 206); and

(3) the conclusions drawn by the twelve jurors resulting in the verdict in favor of the petitioner,

were all expressions of men to whom the predicate "reasonable" or 'fairminded" does not apply.

Since, evidently, such an inference is preposterous, counsel for the petitioner are of the belief that the above stated *first* conclusion, to wit, that only *one* view is possible to be taken from the evidence and that such view is utterly opposed to petitioner's right to recover, has not been, and—being contrary to the *fact* that such evidence *is* susceptible of different interpretations, as to which *fact* even this Honorable Court is powerless to decree its non-existence by judicial fiat—*could not have been,* the cause for the denial of petitioner's application for writ of certiorari.

Consequently, as far as such denial refers to the above question, only the *second* conclusion remains, to wit, that the rule of law, upon which the question submitted for the decision of this Honorable Court was predicated, does no longer obtain in the form as stated. Counsel for the petitioner most urgently submit to this Honorable Court that any abandonment of, or change in, this long established rule of law ought, however, not to be left to inferential or circumstantial ascertainment but be made the subject matter of direct and unequivocal pronouncement by this Honorable Court.

II. The decision of the two justices of the Court of Appeals, forming the majority, has caused consternation among legitimate dealers and brokers in real estate within the District of Columbia. It is respectfully submitted that, by seizing upon the issue of procuring cause, the majority of the court below is seeking simultaneously to advance a certain public policy with regard to contingent fees in the procurement of government contracts, *without, however, positively announcing such public policy.* By stating that the court need not "decide the equally *doubtful* question whether public policy justifies a contingent fee in procuring a government contract" (R. 203), it is submitted, the majority of the court below made not only no contribution to *resolve* such doubt, if it existed, but, on the contrary, causes it to arise and is casting it upon many existing contracts which were entered into in good faith and have, hitherto, following this Court's decision in *Steele* v. *Drummond,* 275 U. S. 199, 72 L. Ed., 238, and the decision of the court below in *Hanger* v. *Fitzsimmons,* 50 App. D. C. 384, not been considered as a "departure from recognized legal and moral standards" (*Crocker* v. *United States,* 240 U. S. 74, 60 L. Ed. 533).

Counsel for the petitioner very respectfully submit that in the present case the review of the jury's determination of the issue of procuring cause should have been governed exclusively by standards of judicial objectivity, and not have been made the occasion—not to say the pretext—for the promotion or *sub rosa* advocacy of a public policy, which has no connection whatsoever with that issue, but, at the most, can only be considered as a desideratum which, by reason of personal preference or social tenet, the two justices of the majority wish to sponsor—though not by direct pronouncement but rather by the indirect method of creating doubt and uncertainty through critical comment (R. 203; dissenting opinion R. 209-211).

III. Counsel for the petitioner know, of course, that, under Rule 38, Subsection 5, of this Honorable Court, "a

review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important reasons therefor.*" Counsel for the petitioner further realize that the deep necessity of the times places before this Court problems of a magnitude compared with which the fate or stake of the individual litigants in the case at bar appears to be utterly trivial. If, therefore, the petition for writ of certiorari was denied in the present case because, in the opinion of this Honorable Court, there was no "important reason" therefor, counsel for the petitioner can do nothing but bow—in resignation—to the wisdom of this Honorable Court. They wish, however, to state, that "importance" is a very relative concept, and that,—having in mind this Court's own statement with *all* its implications, to wit:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." (Jacob v. City of New York, 315 U. S. 752, 86 L. Ed. 1166) —,

they have been led to believe, possibly at the risk of being labeled incorrigible optimists among the legal profession, that the issue here involved, namely, whether an appellate court may substitute its own opinion for the conclusions of the jury, was a reason important enough to warrant the invocation of this Court's supervisory powers. They very respectfully submit that in this small lawsuit there is at hazard, just as surely as in great strifes that sweep the world, an ancient and inalienable right. *If that right cannot find vindication in the courts, it has little chance elsewhere.*

WHEREFORE, your petitioner prays that an order be made by this Court directing a rehearing of the petition for writ of certiorari heretofore filed in this cause, and that upon

such rehearing the said petition be granted and the writ issue as therein prayed for.

Respectfully submitted,

JAMES C. WILKES,
JAMES E. ARTIS,
WALTER R. SCHOENBERG,
Tower Building, Wash., D. C.,
Counsel for Petitioner.

We, the undersigned, counsel for the petitioner in the above entitled cause,

DO HEREBY CERTIFY that the foregoing petition is presented in good faith and not for delay.

Washington, December 30, 1943.

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